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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO ALVARADO, Defendant and Appellant.	F076268 (Super. Ct. No. BF166008A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Eric Bradshaw, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Smith, J. and Meehan, J.

A jury convicted appellant Armando Alvarado of assault with force likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(4)) and resisting an executive officer with force or violence (§ 69). On appeal, appellant contends the trial court should have instructed the jury on the lesser included offense of resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1)) (section 148(a)(1)). We conclude the jury was properly instructed because there was no evidence from which the jury could have reasonably concluded appellant committed the lesser offense without also committing the greater, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After interviewing a victim who reported appellant assaulted and threatened to shoot him, Officer Johns, Officer McNabb, and Officer Parker of the Bakersfield Police Department went to appellant's apartment residence to attempt to arrest him.[2] After arriving, Johns and McNabb went to the front door while Parker positioned himself near the garage in the rear. Johns and McNabb then knocked on appellant's front door, appellant answered, and McNabb stated they needed to speak with him regarding an investigation and asked him to step outside. Appellant responded he was too busy to talk to them, and McNabb replied that appellant was under arrest for assault and ordered him to step outside. Appellant exited the apartment and McNabb ordered him to place his hands behind his head. Appellant did not comply with the order, but instead looked at Johns. Appellant appeared to recognize Johns, who had previously arrested appellant for an unrelated crime, and said, "Johns, this is bullshit. This is conflict of interest." McNabb reached for appellant's left arm to place him in handcuffs, but appellant pulled away. Johns testified that at this point appellant clenched his right hand into a fist and

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1 All further statutory references are to the Penal Code.

2 Our discussion of the facts is limited to appellant's arrest because the facts of the underlying assault and threats are not relevant to the issue raised on appeal.

swung at McNabb, who ducked to avoid being struck. McNabb testified he could not see appellant's hand but saw him turn his body as though he was going to throw a punch, so McNabb grabbed appellant by the shoulders and he fell into a nearby wall. McNabb then tried to apply a rear wrist lock by grabbing appellant's arm, but he pulled away and they both fell onto the ground.

Once on the ground, McNabb attempted to place appellant in handcuffs, but he thrashed his body around, ignoring orders to remove his hands from beneath his torso. Johns deployed her taser, but it appeared to have no effect on appellant, who continued to attempt to push himself away from McNabb. McNabb attempted to subdue appellant by striking him twice in the torso, and Johns cycled her taser a second time, but appellant continued to resist. McNabb then punched appellant in the head with a closed fist, which stunned appellant and allowed McNabb and Parker, who had run over from his position behind the apartment, to put appellant into handcuffs.

Appellant called his neighbor Christian Vindel as a defense witness, who testified to a different version of events. Vindel testified he was inside of his apartment when he heard someone knock on appellant's door and announce Bakersfield Police Department. He then heard a police officer ask appellant to step outside three times and appellant respond by asking if he was being detained or arrested. Vindel looked through his window and saw police officers place appellant in handcuffs and force him to the ground. Vindel then stepped outside of his apartment and saw a female officer shoot appellant with a taser and a male officer punch appellant in the ribs. At no point did Vindel testify he witnessed appellant resist the officers, either physically or verbally.

DISCUSSION

Appellant contends the trial court should have instructed the jury on resisting or delaying an officer (§ 148 (a)(1)), a lesser included offense of resisting an officer by force or violence. We disagree.

Although defense counsel did not request the lesser instruction, it is well settled the trial court has a sua sponte duty to "instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed." (*People v. Birks* (1998) 19 Cal.4th 108, 112; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Additionally, we note that section 148(a)(1) was a lesser included offense of section 69 as pled and instructed in this case. (*People v. Smith* (2013) 57 Cal.4th 232, 240-241 (*Smith*).)

However, we conclude the trial court did not err in failing to instruct on the lesser offense because there was no evidence supporting the conclusion appellant only committed the lesser offense. Specifically, there was no evidence he resisted the officers without the use of force or violence. The jurors were presented with two conflicting versions of appellant's conduct: the testimony of the arresting officers, and the testimony of Vindel. If the jurors believed the testimony of the arresting officers, the only reasonable conclusion was appellant resisted with force and violence and was guilty of a violation of section 69. If the jurors believed Vindel, the only reasonable conclusion was appellant did not resist, the officers used excessive and unreasonable force, and appellant was not guilty of either section 69 or section 148(a)(1). Contrary to appellant's assertion, Vindel's testimony did not support a third possible conclusion that appellant resisted, but without using force or violence. Vindel did not testify to any facts that would provide a factual basis for a violation of section 148(a)(1) alone, such as refusing to comply with the officers' orders or attempting to flee.

We find *Smith* to be instructive. There, the defendant, then incarcerated in county jail, refused officers' instructions to return to his cell, and threatened officers with

violence if they attempted to force him to do so. (*Smith*, *supra*, 57 Cal.4th at p. 241.) As an officer approached the defendant with a large shield, the defendant threw a bowl containing a mixture of urine and feces, striking the officer on the arm. (*Ibid*.) Other officers were then able to subdue the defendant by firing tasers and rubber projectiles at him. (*Ibid*.) The defendant was convicted of section 69 and subsequently claimed on appeal the court should have instructed the jury on section 148(a)(1) as a lesser included offense. (*Smith, supra*, at p. 236.) In holding the jury was properly instructed, the court reasoned: "Defendant was either guilty or not guilty of resisting the executive officers by the use of force or violence in violation of section 69. There was no evidence that defendant committed only the lesser offense of resisting the officers without the use of force or violence in violation of section 148(a)(1)." (*Id*. at p. 245.)

The jurors faced a similarly binary decision based on the evidence presented in appellant's trial: he was either guilty or not guilty of section 69. Therefore, the jury was properly instructed because "if appellant resisted the officers at all, he did so forcefully, thereby ensuring no reasonable jury could have concluded he violated section 148, subdivision (a)(1), but not section 69." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 985.)

DISPOSITION

The judgment is affirmed.